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No. 07-1392

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SUPREME COURT, U.S.

In The

Supreme Court of the United States

LARRY DRUTIS, HAROLD PARKER, JOHN WAYNE SIMPSON, and JOSEPH TKACZ,

Petitioners,

v.

QUEBECOR WORLD (USA) INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

A defined benefit pension plan violates ERISA's prohibition against age discrimination "if, under the plan, the rate of an employee's benefit accrual is reduced, because of the attainment of any age." ERISA § 204(b)(1)(H), 29 U.S.C. § 1054(b)(1)(H).

The question presented is:

Whether the "rate of an employee's benefit accrual is reduced, because of the attainment of any age," under a cash balance formula in which all employees earn pay credits and interest credits to their retirement accounts at the same rate, regardless of age.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Respondent Quebecor World (USA) Inc. makes the following disclosure:

Quebecor World (USA) Inc. is a wholly-owned subsidiary of Quebecor World, Inc., which is, in turn, a wholly-owned subsidiary of Quebecor, Inc., a publicly-held company. No publicly held company owns 10 percent or more of the stock of Quebecor, Inc.

On January 21, 2008, Quebecor World (USA) Inc. filed a petition for relief under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the Southern District of New York, Case No. 08-10152.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

STATEMENT 1

REASONS FOR DENYING THE PETITION 6

I. THERE IS NO CIRCUIT SPLIT ON THE SOLE QUESTION PRESENTED 7

II. CONGRESS HAS NOW ADDRESSED THE ISSUE 9

III. REVIEW IS NOT WARRANTED BECAUSE PETITIONERS' CLAIMS ARE LIKELY TO FAIL EVEN IF THE QUESTION PRESENTED WAS DECIDED IN THEIR FAVOR 10

CONCLUSION 12

TABLE OF AUTHORITIES

Cases — Page

Amara v. CIGNA Corp., 534 F. Supp. 2d 288 (D. Conn. 2008) 8

Bryerton v. Verizon Communications, Inc., No. 06-cv-6672, 40 Empl. Ben. Cas. 1884 (S.D.N.Y. April 17, 2004), *appeal docketed*, 07-1680 (2d Cir. argued April 22, 2008)..... 8

Buus v. WAMU Pension Plan, No. C07-0903, 43 Empl. Ben. Cas. 1378 (W.D. Wash. Dec. 18, 2007) 9

Commissioner v. Keystone Consolidated Industries, Inc., 508 U.S. 152 (1993)..... 1

Cooper v. IBM Personal Pension Plan, 457 F.3d 636 (7th Cir. 2006), *cert denied*, 127 S. Ct. 1143 (2007) 7

Crosby v. Bowater Inc. Retirement Plan for Salaried Employees of Great Northern Paper Inc., 382 F.3d 587 (6th Cir. 2004)..... 2

Custer v. Southern New England Telephone Co., No. 05CV1444, 42 Empl. Ben. Cas. 2479 (D. Conn. Jan. 24, 2008) 8

Eaton v. Onan Corp., 117 F. Supp. 2d 812 (S.D. Ind. 2000) 9

Page

George v. Duke Energy Retirement Cash Balance Plan, No. 08-373, 2008 U.S. Dist. LEXIS 43521 (D.S.C. June 2, 2008) 9

Hirt v. Equitable Retirement Plan, 441 F. Supp. 2d 516 (S.D.N.Y. 2006), *appeal docketed*, No. 06-4757 (2d Cir. argued April 22, 2008) 8

Hughes Aircraft Co. v. Jacobson, 525 U.S. 432 (1999) 1, 2

Hurlic v. Southern California Gas Co., No. 05-5027 (C.D. Cal. Oct. 18, 2005) *appeal docketed*, No. 06-55599 (9th Cir. argued Feb. 15, 2008). 9

In re Citigroup Pension Plan ERISA Litigation, 470 F. Supp. 2d 323 (S.D.N.Y. 2006) 8

In re J.P. Morgan Chase Cash Balance Litigation, 460 F. Supp. 2d 479 (S.D.N.Y. 2006) 8

Laurent v. PriceWaterhouseCoopers LLP, 448 F. Supp. 2d 537 (S.D.N.Y. 2006) 8

Register v. PNC Financial Services Group, Inc., 477 F.3d 56 (3d Cir. 2007) 2, 7

Richards v. FleetBoston Financial Corp., 427 F. Supp. 2d 150 (D. Conn. 2006) 8

Page

Sunder v. U. S. Bank Pension Plan,
No. 05-cv-01153, 2007 WL 541595
(E.D. Mo. Feb. 16, 2007) 9

Tomlinson v. El Paso Corp.,
No. 04-cv-02686, 40 Empl. Ben. Cas. 1787,
43 Empl. Ben. Cas. 1932,
(D. Colo. March 22, 2007) 9

Tootle v. ARINC Inc.,
222 F.R.D. 88 (D. Md. 2004) 9

Walker v. Monsanto Co. Pension Plan,
No. 04-cv-436, 41 Empl. Ben. Cas. 2397
(S.D. Ill. Sept. 13, 2007) 9

Statutes

29 U.S.C. § 1001 1

29 U.S.C. § 1002(23) 3

29 U.S.C. § 1054(b)(1)(H) ..... *passim*

29 U.S.C. § 1054(b)(5) 10

29 U.S.C. § 1132(a)(3) 6, 11

Pension Protection Act of 2006,
Pub. L. No. 109-280
120 Stat. 780 (2006) 10

Other **Page**

Internal Revenue Service Notice 96-8, 1996-1 C.B. 359 ..... **2**

Robert L. Stern *et al.*, *Supreme Court Practice* (8th ed. 2002)..... **8, 10**

STATEMENT

Petitioners seek review of a decision of the Court of Appeals for the Sixth Circuit rejecting their claims that a cash balance plan discriminates against employees on the basis of age in violation of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001, *et seq.* The Sixth Circuit, agreeing with the only other two courts of appeals that have addressed this issue, as well as the vast majority of the district courts, held that the plan is not age discriminatory merely because younger employees, who have more years to work before attaining age 65 than otherwise similarly-situated older employees, will accumulate more interest in their retirement accounts by age 65 than the older employees.

ERISA recognizes two types of employee retirement plans: defined benefit plans and defined contribution plans. *See generally Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 433 (1999). In a defined benefit plan, a plan participant is entitled to a fixed benefit payment upon retirement. *Id.* at 439 (citing *Commissioner v. Keystone Consol. Indus., Inc.*, 508 U.S. 152, 154 (1993)). Benefits are paid from "a general pool of assets rather than individual dedicated accounts," and the employer "bears the entire investment risk and . . . must cover any underfunding as the result of a shortfall that may occur from the plan's investments." *Hughes*, 525 U.S. at 439.

By contrast, a defined contribution plan (also known as an "individual account plan") establishes an individual account for each participant, to which

the employer makes periodic contributions, often augmented by contributions from the participant. *Id.* The participant's retirement benefit in a defined contribution plan is based on the amount that has accumulated in his or her individual account by the time of retirement, from both contributions and investment earnings. *Id.* Thus, in a defined contribution plan, the participant bears the investment risk. *Id.*

Cash balance plans function similarly to defined contribution plans, but are classified as defined benefit plans. *See Crosby v. Bowater Inc. Ret. Plan for Salaried Employees of Great N. Paper Inc.*, 382 F.3d 587, 590 (6th Cir. 2004); Internal Revenue Service Notice 96-8, 1996-1 C.B. 359 ("Notice 96-8"). As in a defined contribution plan, the benefits in a cash balance plan are measured by the value of an account to which the employer credits a percentage of the participant's compensation. *Register v. PNC Fin. Servs. Group, Inc.*, 477 F.3d 56, 62 (3d Cir. 2007). The account is also credited with interest based on a specified benchmark, *e.g.*, the annual yield on one-year U.S. Treasury securities. *Id.*; Notice 96-8. The accounts are only notional, however, *Id.*; *Crosby*, 382 F.3d at 590; benefits are paid from a general pool of assets, like in a traditional defined benefit plan. Also like a traditional defined benefit plan, if the actual investment yield of the cash balance plan's assets falls below the rate of interest guaranteed by the plan, the employer is obligated to make up the difference. *Register*, 477 F.3d at 63. Thus, in a cash balance plan, like a traditional defined benefit plan, the investment risk is borne by the employer. *Id.*

In a cash balance plan, any two employees who work for the plan sponsor for the same number of years and with the same compensation will have exactly the same account balance when their service ends, regardless of age. If, however, an age 50 employee ends his service and leaves his account in the plan until age 65, he will earn only 15 years of additional interest, but if a similarly-situated age 40 employee ends his service and leaves his account in the plan until age 65, he will earn an additional 25 years of interest. For this reason, the younger employee's "accrued benefit," defined under ERISA as the benefit payable at age 65, ERISA § 3(23), 29 U.S.C. § 1002(23), will be higher than the older employee's accrued benefit. This is the basis for the Petitioners' claim in this case that cash balance plans are inherently age-discriminatory. Petitioners contend that because the potential age 65 benefit of a younger employee is larger than the potential age 65 benefit of an older employee, the "rate of an employee's benefit accrual is reduced, because of the attainment of any age," in violation of ERISA § 204(b)(1)(H), 29 U.S.C. § 1054(b)(1)(H).

Petitioners are participants and former participants in the World Color Press Cash Balance Plan (the "World Color Plan"), which was previously sponsored and maintained by World Color Press, Inc. ("World Color"). Pet. App. 2-3.[1] The World Color Plan established two notional accounts – a Future Service Account for all employees, and, in the case of an employee who, like the Petitioners, had previously participated in a predecessor employer's

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[1] In 1999, World Color merged with Quebecor Printing, Inc. The surviving entity was renamed Quebecor World (USA) Inc., Respondent herein.

plan, a Transition Account. Pet. App 2. World Color posted monthly credits to participants' Future Service Accounts in an amount equal to 4% of their monthly compensation, plus interest at the rate payable on one-year U.S. Treasury bills as of the previous December 31 (with a floor of 3%). *Id.* World Color credited the Transition Account with an initial balance equal to the lump sum actuarial equivalent of the benefits participants had earned under their predecessor employer's plan, plus monthly interest at the rate payable on one-year U.S. Treasury bills as of December 31 of the prior year. *Id.*

Two of the Petitioners, Larry Drutis and Joseph Tkacz, retired from World Color on December 31, 1998 and took a distribution of their benefits from the World Color Plan at that time. *Id.* at 3. The World Color Plan contained a special "grandfathering" provision for plan participants who had participated in a plan of a predecessor employer and who met certain other conditions; such participants were entitled to receive the greater of (a) the benefit they would have received under the plan of their predecessor employer had they continued to participate in that plan until their date of retirement from World Color (taking into account their service and pay with World Color as of their retirement date), or (b) their cash balance benefit under the World Color Plan. *Id.* at 2-3. Petitioners Drutis and Tkacz were "grandfathered" under this provision, and as a result, their benefits were calculated under the plan of their predecessor employer, taking into account their service and pay with World Color. *Id.* at 3.

Petitioners Drutis and Tkacz were younger than 65 when they retired and received their benefits. *Id.* Petitioners John Simpson and Harold Parker have not yet received a distribution of their benefits; both of them are also younger than age 65. *Id.*

Petitioners filed this action alleging, *inter alia*, that the World Color Plan violated ERISA § 204(b)(1)(H), 29 U.S.C. § 1054(b)(1)(H). Pet. App. 18. On July 7, 2006, the parties filed cross motions for summary judgment, and on September 25, 2006, the district court granted Respondent's motion, denied Petitioners' motion, and granted judgment in Respondent's favor. *Id.*

The district court made four separate holdings. First, the court held that Petitioners Drutis and Tkacz lacked standing to challenge the legality of the World Color Plan because their benefits were calculated under the terms of their predecessor employer's plan rather than the World Color Plan. Pet. App. 24-26. Second, the district court held that all of the Petitioners lacked standing to assert a claim of age discrimination under ERISA § 204(b)(1)(H), 29 U.S.C. § 1054(b)(1)(H), because that provision applies only to benefits earned after normal retirement age – age 65 – and the Petitioners either took a full distribution of their benefits from the World Color Plan prior to age 65, or had not yet reached age 65. *Id.* at 26-28. Third, the court held that even if Petitioners possessed standing to challenge ERISA § 204(b)(1)(H), 29 U.S.C. § 1054(b)(1)(H), Respondent was entitled to summary judgment because the World Color Plan did not discriminate on the basis of age in violation of that provision. *Id.* at 29-40. And finally, the

district court held that the relief requested by the Petitioners – monetary damages – was a legal remedy not available under ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3), (the sole provision under which Petitioners had sued), because that provision permits the recovery of only equitable relief. *Id.* at 40-42.

On August 27, 2007, the Court of Appeals for the Sixth Circuit affirmed, unanimously holding that the World Color Plan did not discriminate on the basis of age in violation of ERISA § 204(b)(1)(H), 29 U.S.C. § 1054(b)(1)(H). Pet. App. 1. The Court of Appeals also unanimously affirmed the district court's holding that Petitioners Drutis and Tkacz lacked standing to bring this action because they had suffered no injury. *Id.* at 4-5. In reaching its decision, the Court of Appeals assumed without deciding that ERISA § 204(b)(1)(H), 29 U.S.C. § 1054(b)(1)(H), applies before age 65. *Id.* at 6-7. The Court found it unnecessary to address the district court's alternative holding that the relief sought by the Petitioners was not available under ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3). *Id.* at 17.

REASONS FOR DENYING THE PETITION

Review is not warranted here. There is no split in the circuits; on the contrary, the decision of the court below is consistent with the only other two Courts of Appeals and the vast majority of the district courts that have addressed the question presented. Congress has now addressed the issue, prospectively, providing unequivocally that cash balance plans like the one at issue in this case do not discriminate on the basis of age. And finally, while

the judgment in this case in favor of the Respondent was supported by several alternative holdings in the courts below, the Petitioners have sought review of only one of them, making this case an especially poor vehicle for review of the question presented. For all of these reasons, the petition should be denied.

I. THERE IS NO CIRCUIT SPLIT ON THE SOLE QUESTION PRESENTED.

Petitioners have not identified any split in the circuits that would warrant review by this Court. On the contrary, the only other Courts of Appeals to have addressed whether cash balance plans discriminate on account of age in violation of ERISA § 204(b)(1)(H), 29 U.S.C. § 1054(b)(1)(H) – the Third and Seventh – have held, like the Court below, that they do not. *Cooper v. IBM Pers. Pension Plan*, 457 F.3d 636 (7th Cir. 2006), *cert denied*, 127 S. Ct. 1143 (2007); *Register v. PNC Fin. Servs. Group, Inc*, 477 F.3d 56 (3d Cir. 2007).

Unable to point to a circuit conflict, Petitioners instead argue that there are "two lines of contradictory authority on whether cash balance plans, per se, violate ERISA" because the decision below and the decision of the Seventh Circuit in *Cooper* conflict with three district court decisions, all from the Second Circuit. Pet. at 7.[2] However, this Court does not ordinarily grant review of a circuit court decision merely because it conflicts "with a decision rendered by a district court, whether in the

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[2] Petitioners fail to identify that there is a third circuit court decision on point, the Third Circuit's decision in *Register*, despite the fact that the Court of Appeals in this case quoted extensively from that decision.

same circuit or in another circuit." Robert L. Stern *et al.*, *Supreme Court Practice* 237 (8th ed. 2002). It is the duty of the Courts of Appeals, not this Court, to maintain uniformity within their respective circuits. *Id.* Indeed, the three district court decisions from the Second Circuit that Petitioners cite – *Richards v. FleetBoston Fin. Corp.*, 427 F. Supp. 2d 150 (D. Conn. 2006); *In re J.P. Morgan Chase Cash Balance Litig.*, 460 F. Supp. 2d 479 (S.D.N.Y. 2006); *In re Citigroup Pension Plan ERISA Litig.*, 470 F. Supp. 2d 323 (S.D.N.Y. 2006) – are themselves in conflict with ***five*** other decisions within the Second Circuit – *Amara v. CIGNA Corp.*, 534 F. Supp. 2d 288 (D. Conn. 2008); *Custer v. S. New Eng. Tel. Co.*, No. 05CV1444, 42 Empl. Ben. Cas. 2479 (D. Conn. Jan. 24, 2008); *Bryerton v. Verizon Commc'ns, Inc.*, No. 06-cv-6672, 40 Empl. Ben. Cas. 1884 (S.D.N.Y. April 17, 2004); *Laurent v. PriceWaterhouseCoopers LLP*, 448 F. Supp. 2d 537 (S.D.N.Y. 2006); *Hirt v. Equitable Ret. Plan*, 441 F. Supp. 2d 516 (S.D.N.Y. 2006). And even this conflict will soon be resolved; *Hirt* and *Bryerton* were appealed to the Court of Appeals for the Second Circuit, Case Nos. 06-4757 and 07-1680 and were argued together on April 22, 2008.

Petitioners, moreover, greatly exaggerate the extent of any alleged conflict. Consistent with the circuit courts, the overwhelming majority of district courts that have considered this issue have concluded that cash balance plans are not discriminatory. In addition to the district court below and the five other decisions from the Second Circuit cited above, at least eight other district courts have considered and rejected challenges to cash balance plans as violating ERISA

§ 204(b)(1)(H), 29 U.S.C. § 1054(b)(1)(H). *See, e.g.*, *George v. Duke Energy Ret. Cash Balance Plan*, No. 08-373, 2008 U.S. Dist. LEXIS 43521 (D.S.C. June 2, 2008); *Buus v. WAMU Pension Plan*, No. C07-0903, 43 Empl. Ben. Cas. 1378 (W.D. Wash. Dec. 18, 2007); *Walker v. Monsanto Co. Pension Plan*, No. 04-cv-436, 41 Empl. Ben. Cas. 2397 (S.D. Ill. Sept. 13, 2007); *Tomlinson v. El Paso Corp.*, No. 04-cv-02686, 40 Empl. Ben. Cas. 1787, 43 Empl. Ben. Cas. 1932, (D. Colo. March 22, 2007); *Sunder v. U.S. Bank Pension Plan*, No. 05-cv-01153, 2007 WL 541595 (E.D. Mo. Feb. 16, 2007); *Tootle v. ARINC Inc.*, 222 F.R.D. 88 (D. Md. 2004); *Eaton v. Onan Corp.*, 117 F. Supp. 2d 812 (S.D. Ind. 2000); *Hurlic v. Southern Cal. Gas Co.*, No. 05-5027 (C.D. Cal. Oct. 18, 2005), *appeal docketed,* No. 06-55599 (9th Cir. argued Feb. 15, 2008). The three district court decisions cited by Petitioners are the ***only*** outstanding court decisions to have reached a contrary result.

At most, Petitioners have identified a split among district court decisions within a single circuit – a split that will soon be resolved. This is plainly not a sufficient basis for granting review.

II. CONGRESS HAS NOW ADDRESSED THE ISSUE.

As Petitioners acknowledge, Pet. at 8, the section of ERISA under which this dispute arose has now been amended, prospectively, to make clear that cash balance plans are not inherently age-discriminatory.

On August 17, 2006, Congress enacted the Pension Protection of 2006 ("PPA 2006"). Pub. L.

No. 109-280, 120 Stat. 780 (2006). PPA 2006 provides, among other things, that on and after June 29, 2005, a cash balance plan does not violate the age discrimination provisions of ERISA if, under the terms of the plan, a participant's benefit is equal to or greater than that of a similarly-situated younger person. PPA § 701, codified as ERISA § 204(b)(5), 29 U.S.C. § 1054(b)(5). Cash balance plans like the World Color Plan that provide all participants with the exact same compensation and interest credits regardless of age unequivocally meet this requirement. The enactment of PPA 2006 thus substantially limits the significance of the decision below, making further review by this Court unnecessary.

III. REVIEW IS NOT WARRANTED BECAUSE PETITIONERS' CLAIMS ARE LIKELY TO FAIL EVEN IF THE QUESTION PRESENTED WAS DECIDED IN THEIR FAVOR.

This case is an especially poor vehicle for review of the question presented because any decision by this Court would likely have no effect on the case's ultimate disposition. *See* Robert L. Stern *et al.*, *Supreme Court Practice* 457 (8th ed. 2002) (case "presents a poor vehicle for resolving a conflict" where it "would be decided in favor of the Respondent no matter how the conflict is resolved.")

The district court granted summary judgment in favor of Respondent on four separate and independent grounds, one of which was dispositive as to two of the four Petitioners, and the other three of which were fully dispositive of the entire case.

Thus, in addition to its holding that the World Color Plan did not discriminate on account of age in violation of ERISA § 204(b)(1)(H), 29 U.S.C. § 1054(b)(1)(H), the district court ruled that two of the Petitioners – Drutis and Tkacz – lacked standing to challenge the design of the World Color Plan because their benefits were calculated under the provisions of the plan of their predecessor employer. The Court of Appeals affirmed this holding, and the Petitioners have not asked this Court to review it. Accordingly, even if this Court were to grant review of the question presented *and* reverse the Court of Appeals' holding under ERISA § 204(b)(1)(H), 29 U.S.C. § 1054(b)(1)(H), neither Drutis nor Tkacz would be entitled to pursue their claims.

The district court further held that none of the Petitioners had standing to bring the claims asserted in the complaint because ERISA § 204(b)(1)(H), 29 U.S.C. § 1054(b)(1)(H), applies only to benefits earned after age 65, and that even if Petitioners had standing and had otherwise stated a valid claim, they were not entitled to any relief because the relief they sought was not available under ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3). Having held that the World Color Plan did not violate ERISA § 204(b)(1)(H), 29 U.S.C. § 1054(b)(1)(H), the Sixth Circuit found it unnecessary to reach the merits of these two alternative grounds for granting judgment in favor of Respondents. Consequently, if the Court were to grant review and reverse the decision below, it would be required to remand the case to the Court of Appeals so that it could address these alternative holdings of the district court. Because both of the alternative holdings are also fully dispositive of the entire case, the outcome in this case would remain

the same even if the Court of Appeals were to affirm only one of them.

CONCLUSION

For all of the reasons described above, the petition for certiorari should be denied.

Respectfully submitted,

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June 2008

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